



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

reasonable value of his labor, and a contract to do so will be implied. If he so neglects his rights as to allow a violation of the terms that should be no excuse to one who has expended his money and labor. He may in the first place refuse to allow the contractor to enter until he has recorded the contract.

In *Condon v. Donahue*,¹² it is expressly stated that the statute applies to actions between parties to the contract. But the principle that the contract must be "the measure and test of the contractor's right to recover," or at least the upper limit, is affirmed. A recent case¹³ holds that the void contract measures the contractor's right to retain money paid to him and allows a recovery of a surplus above the contract price paid by mistake.

There is a possible legal justification for this holding. Though not a contract the writing might be regarded as an admission by the parties of the value of the work to be done. It would as such be admissible against a party who claimed a different value for the work, and in that sense would be the "measure and test of the contractor's right to recover."

However upon whatever theory this decision is supported, it practically negatives, as far as the parties are concerned, the effect of the statute which makes such contracts void. It seems questionable whether such a statute enacted for the protection of many should be negated to avoid hardship in those few cases where the contractor made a bad bargain and would be able to recover more on a *quantum meruit* than the contract stipulated.

E. N. V.

INDICTMENT AND INFORMATION—ACCESSORIES BEFORE THE FACT—INDICTMENT AS PRINCIPALS—At common law the offense of being an accessory before the fact to a crime existed only when the crime committed was a felony. If the crime committed were treason or were a misdemeanor the procurer was a principal not an accessory. In other words one who instigated another to commit treason or a misdemeanor was a principal in the treason or misdemeanor actually committed, but the instigator of a successful felony was an accessory only. The distinction was, however, procedural only, the punishment meted to the accessory in felony being the same as that suffered by the convicted principal, just as the punishment of the procurer in treason and misdemeanor was the same as that of the principal or misdeemeanant. The procedural differences were two: first, the instigator in treason and misdemeanor could be tried at any time, whereas the accessory in felony could not be put on trial until the principal had been convicted;

¹² 160 Cal. 749 (1911); see also *Mannix v. Radke Co.*, 166 Cal. 333 (1913).

¹³ *R. R. v. West*, 167 Pac. 868 (1917).

second, in treason and misdemeanor the instigator could be charged in the indictment as the actual doer of the crime, or the act of the doer could be set out, and it could then be alleged that the instigator procured the doing,¹ whereas in felony the instigator could not be charged as the doer of the principal act, but the indictment had first to aver the guilt of the principal and then to aver that the instigator, before the doing of the principal felony, procured the principal to commit the said felony.²

To remedy the failure of justice sometimes resulting from the rule that the accessory in felony could not be tried until after the principal had been convicted statutes have been passed in England and some of our states. Some of these statutes, such as the one in force in Pennsylvania, are very sweeping, providing that the accessory "may be indicted, tried, convicted and punished, in all respects as if he were a principal felon." Others, like the Virginia statute of 1877, provide only that the accessory shall be punished as if he were the principal felon, and that he "may be indicted, tried and punished whether the principal felon be convicted or not, or be amenable to justice or not."

Others, like the statute of Illinois,³ first define an accessory as being one who advises, *etc.*, another to commit a crime, and then provides that he who thus advises, *etc.*, "Shall be considered as principal and punished accordingly."

Under the Pennsylvania statute providing in terms that the accessory may be indicted, tried and punished as if he were the principal, it is held that the indictment may either charge him specifically as a principal or as an accessory.

Under the Virginia statute, providing only, as it does, that the accessory may be punished as if he were a principal, it has been held that an accessory must be charged as an accessory, with having procured another to commit the felony, and cannot be charged as a principal—with having himself done the felonious act.⁴

The Illinois statute expressly defines an accessory as follows: "Accessories—Before the Fact. Section 2. An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal, and punished accordingly." Section 3 provides that "every *such accessory*—may be indicted and convicted at the same time as the principal, or before or after his conviction and whether the prin-

¹ 3 Bish. New Cr. Proc., Sec. 2.

² 3 Bish. New Cr. Proc., Sec. 9.

³ Secs. 274, 275, Cr. Code, Hurds' Stat., 1911, p. 818.

⁴ Hatchett v. Com., 75 Va. 925.

cial is convicted or amenable to justice or not, and punished as principal."

In a recent Illinois case,⁵ one Snyder had procured another to commit a felony. Snyder was indicted. In the body of the indictment Snyder was charged as an accessory, *i. e.*, with procuring R. to commit a certain felony, and in the concluding part of the indictment it was averred that Snyder himself did the act constituting the felony, *i. e.*, he was charged as a principal. The indictment was sustained. The court held that the statute abolished the distinction between accessory before the fact and principals, and said: "The pleader may, if he chooses, state the circumstances of the offense as in an indictment against an accessory before the fact, yet the indictment must contain an allegation charging the defendant as principal."

In an earlier case in the same court, one who had procured another to commit murder had been charged simply as an accessory, *i. e.*, with having procured another to commit the murder, without a further allegation that defendant had himself actually done the killing—which indeed he had not—the court reversed judgment against him, holding that the statute had abolished the offense of accessory by making accessories principals, and that therefore as no such offense existed an indictment charging only such offense charged no crime.⁶

On the other hand in another case in the same jurisdiction⁷ the defendant who had procured another to commit murder was indicted simply as a principal, as having himself committed the act of murder. The court held that he was properly convicted on such indictment though the evidence showed him to be guilty only as accessory before the fact. The court saying: "They (accessories) must be indicted as principals or not at all, for they are declared by the act to be principals."

From these three cases it appears that in Illinois, under the statute, the procurer of a felony cannot be indicted as an accessory merely; that he can be indicted as a principal merely; and that he may be charged in the statement as accessory by setting out the true facts, and then averring that he actually did the act constituting the substantive felony.

There are objections to both of the methods, upheld in the cases cited, of indicting an accessory under such a statute. If he is indicted merely as having himself done the act constituting the substantive felony the indictment does not in the first place inform him of the facts to be proved against him. He is charged with having at a certain time and place impersonated B, whereas the

⁵ *People v. Snyder*, 117 N. E. 119.

⁶ *Fixmer v. People*, 153 Ill. 123.

⁷ *Baxter v. People*, 8 Ill. 368.

proof shows that at another time and place he paid X five dollars to impersonate B. If he is charged in one part of the indictment with having done certain accessorial acts and in another part with having done the substantive felony, there is a repugnancy in the indictment.

The best method would seem to be the one held erroneous by the Illinois court, *viz.*, that of simply charging the defendant with the acts in fact done by him. The indictment would then apprise him of the "nature and cause of the accusation against him," would truly inform him of the facts he would be called upon to meet, there would be no variance between the facts charged and the facts proved, and there would of course be no repugnancy in the indictment itself. Having been found guilty "as charged in the indictment" the provision of the statute becomes effective which declares that "He who thus aids, abets, assists, advises or encourages, shall be considered as principal, and punished accordingly." This is a conclusion of law and conclusions of law need not be stated in the indictment. This view has been taken by some courts, notably the California court. The California statute goes further than the Illinois statute in that it provides that the accessory may be indicted, tried and convicted and punished as though he were a principal. In *People v. Campbell*,⁸ the court held that under this statute the accessory must be indicted as an accessory and not as a principal. The court said it is a fundamental principle in criminal jurisprudence that the accused is entitled to be informed by the indictment of the particular *acts* which he is alleged to have committed, as constituting the offense; and if he in fact, only aided and abetted the crime, the fact must be so stated in the indictment. He then comes to the trial with a knowledge of the acts which are imputed to him.

If the Illinois Legislature really intended to abolish the distinction between principal and accessory, as the court says it in fact did, the method used was ill-chosen, in view of the fact that the statute expressly defines an accessory and prescribes the time when "such accessory" may be indicted. The holding of the court in *Fixmer v. People* that such an indictment charged no crime since the statute had abolished the offense of accessory by making accessories principals would seem to be untenable. The statute did not abolish facts—it could not—on the contrary it expressly recited the facts which were alleged against the defendant, and then proceeded to declare—a conclusion of law—that when these facts exist the defendant shall be "regarded as a principal and punished (not indicted) accordingly." The facts that the statute recites as constituting one guilty of the crime of being a principal were alleged in the indictment, therefore under the statute the facts if proved

⁸ 40 Cal. 129.

as laid, constituted the crime of being a principal. The facts plus the statute charged the crime of being a principal, not the crime of being an accessory as the court says.

William E. Mikell.

A LATIN PASSAGE IN BLACKSTONE—Aigler's "Cases on Property,"¹ contains a quotation from Blackstone as follows: "All corporeal hereditaments as lands and houses, are said to lie in livery; and the others, as advowsons, commons, rents, reversions, *etc.*, to lie in grant. And the reason is given in Bracton: '*Traditio*, or livery, *nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem traductio: sed res incorporeales, quae sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur*' (livery is merely the transferring from one person to another, from one hand to another, or the induction into possession of a corporeal hereditament; but an incorporeal hereditament, *which is the right itself to a thing or inherent in the person*,² does not admit of delivery)."

The italicized passage is clearly wrong. It is incorrect as a translation, showing that the translator did not know how to construe the Latin grammatically; and it makes bad sense logically and legally. Taking the grammar first. "*Jus rei*" is not the way to say in Latin "the right to a thing." "*Jus in rem*" or "*jus in re*" or "*jus ad rem*," might have such a meaning. As a matter of fact these several phrases have their respective technical meanings which it is not my province now to discuss. "*Corpus*" does not mean person. "*Persona*" has that meaning, whereas "*corpus*" is almost the same as "*res*" except that it is not so extensive in its signification, denoting more definitely than "*res*," a physical, corporeal substance. Finally the word "*vel*" does not connect "*sunt ipsum jus rei*" with "*corpori inhaerens*," which would be impossible Latin. It connects "*rei*" with "*corpori*," both of which are governed by "*inhaerens*," which in turn agrees with "*jus*."

Logically and legally speaking, what is meant by the statement that an incorporeal hereditament is "the right itself to a thing, or inherent in the person"?

The person in whom a right inheres is apparently the person entitled, whereas when we speak of a "right to a thing," the thing is the subject of the right, to use Austin's terminology. The connection of these two by "or" makes no sense, since they are neither equivalent nor opposed. The only meaning the translator could have attached to the expression would seem to be, "the right to a thing inherent in a piece of land, or the right to a thing inherent

¹ Page 162.

² Italics mine.